IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE C.N.RAMACHANDRAN NAIR

WEDNESDAY, THE 30TH MAY 2007 / 9TH JYAISHTA 1929

WP(C).No. 8711 of 2007(K)

PETITIONER:

HOTEL SEARS PVT. LTD.,
M.C.ROAD, KOTTAYAM,
REPRSENTED BY JOY K.MANI, DIRECTOR.

BY ADV. DR.K.B.MUHAMED KUTTY (SR.)
SRI.K.M.FIROZ

RESPONDENTS:

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1. THE COMMERCIAL TAX OFFICER ON
DEPUTATION TO THE COMMERCIAL TAXES,
SPECIAL CIRCLE (KVAT), KOTTAYAM.

2. THE COMMISSIONER OF COMMERCIAL TAXES,
PUBLIC BUILDING, MUSEUM JUNCTION,
THIRUVANANTHAPURAM- 695 033.

3. THE STATE OF KERALA,
REPRESENTED BY SECRETARY TO GOVERNMENT,
TAXES DEPARTMENT, SECRETARIAT,
THIRUVANANTHAPURAM.

BY GOVERNMENT PLEADER MOHAMMED RAFIQ

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 30/05/2007, ALONG WITH WPC NO.9783 OF 2007 & CONNECTED CASES, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER'S EXHIBITS:

P1: TRUE COPY OF NOTICE DEMANDING THE ENHANCED AMOUNT ISSUED TO 1ST PETITIONER DT.24.2.2007.

P2: TRUE COPY OF CIRCULAR NO.44 ISSUED BY R2, COMMISSIONER DT.27.11.2006.

P3: TRUE COPY OF STAY ORDER IN WPC NO.4053/2007 DT.6.2.2007 OF THIS HON'BLE COURT.

TRUE COPY

P.A. TO JUDGE

C.R.

C.N.RAMACHANDRAN NAIR, J.

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W.P.(C) Nos.8711, 9783, 8194, 9445,
4053, 8831, 13620, 16110, 8696,
10530, 10636, 11023 & 11070 of 2007

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Dated this the 30th day of May, 2007.

JUDGMENT

These W.Ps. are filed by Bar Hotel owners challenging amended provisions of the Kerala General Sales Tax Act, 1963 (hereinafter called "the Act") pertaining to levy of turnover tax on liquor under the compounding scheme. Section 5(2) of the KGST Act among other things provides for levy of turnover tax at 10% on the sales turnover of alcoholic liquor by bar hotels. The KGST Act was amended by Kerala Finance Act, 2005 providing for payment of tax at compounded rate by bar licencees for the year 2005-2006 onwards. The amendment introduced in Section 7 of the Act gave an option to bar hotels to pay turnover tax at the compounded rate provided therein instead of paying turnover tax at 10% on sales turnover as provided under Section 5(2) of the Act. The turnover tax payable under the compounding scheme under Section 7(a) was at the same rate as provided under Section 5(2) but on 140% of the purchase price of liquor, if the bar hotel is situated within the area of a Municipal Corporation or Municipal Council or a cantonment. Clause(b) of Section 7on the other

hand provided for payment of turnover tax at the same rate on 135% of the purchase price of liquor, if the bar hotel is situated in places other than the area covered by Clause (a). In other words, turnover tax payable by the bar hotels at compounded rate as introduced by Kerala Finance Act, 2005 provides for payment of tax at the rate prescribed under Section 5(2) on the purchase turnover as stated above as against turnover tax otherwise payable on sales turnover. However, facility for compounding was not extended to hotels above three star, heritage hotel or club.

2. The petitioners opted for payment of turnover tax at compounded rate as provided above for the years 2005-2006 and 2006-2007. As required under the provisions of the Act and Rules, they have furnished application for compounding, obtained orders and were paying turnover tax at compounded rate as provided under Section 7(a) and (b) when the Finance Bill 2006 was introduced. The said Bill proposed an amendment to Section 7 in regard to the scheme of compounding for payment of turnover tax on liquor. The Bill was passed and the amended provisions were brought into force through the Kerala Finance Act, 2006 published in the Gazette on 24.10.2006. The amended provisions on turnover tax were made effective from 1.7.2006. In order to appreciate the grievance and contentions of the petitioners, the provisions on turnover tax on liquor under

compounding scheme prior to amendment by Finance Act, 2006 and after amendment are extracted hereunder for easy reference:

Section 7:- Prior to the amendment by Finance Act, 2006.

S.7: "Payment of tax at compounded rates: Notwithstanding anything contained in sub-section (2) of Section 5, any bar attached hotel, not being a star hotel of and above three star hotel, heritage hotel or club, may at its option, instead of paying turnover tax on liquor in accordance with the provisions of the said sub-section, pay turnover tax at the rate specified under the said sub-section on the turnover of foreign liquor calculated at the following percentage of the purchase price of such liquor, namely:

a) In the case of those situated within the area of a municipal corporation, municipal council or cantonment	One hundred and forty percentage
b) In the case of those situated in any other place	One hundred and thirty five percent"

Provisions after amendment

"7. Payment of tax at compounded rates:- Notwithstanding anything contained in sub-section (2) of Section 5, any bar attached hotel, not being a star hotel of and above three star hotel, heritage hotel or club, may, at its option, instead of paying turnover tax on foreign liquor in accordance with the provisions of the said sub-section pay turnover tax on the turnover of foreign liquor calculated,-

(a) at one hundred and forty per cent of the purchase value of such liquor in the case of those situated within the area of a municipal corporation or a municipal council or a cantonment, and at one hundred and thirty five percent of the purchase value of such liquor in he case of those situated in any other place; or

(b) at one hundred and fifteen percent of the highest turnover tax payable by it as conceded in the return or accounts or the tax paid for the previous consecutive three years, whichever is higher."

It is clear from the above that Section 7(a) and (b) prior to amendment provide for payment of turnover tax on alcoholic liquor by bar owners at the same rate as provided under Section 5(2) at 140% or 135% of the purchase price depending on whether the bar hotel is in a Municipal area or in Panchayat or any other areas. The provisions were very simple and petitioners were remitting tax at compounded rate during 2005-2006 based on orders issued by the Assessing Officers. However, the amendment to the compounding scheme drastically changed the scope of it by providing for payment of turnover tax at 115% of the highest turnover tax payable by the dealer as conceded in the return or accounts or the said tax paid for the three previous consecutive years, if such tax is higher than the turnover tax payable under the unamended provisions. In other words, turnover tax liability of the bar hotel under compounding scheme after amendment has to be determined as follows:

(1) Find out the purchase turnover of liquor of the bar hotel and determine the turnover tax liability at the rate provided under Section 5(2) of the Act on 140% or 135% of the purchase price depending on whether the bar hotel is located in a Municipal area or in a non-Municipal area.

(2) Verify the returns and details of payment of turnover tax on liquor by the bar hotel in the three years immediately preceding 2006-2007 and

find out the highest turnover tax payable or paid in any of the said preceding years.

(3) Compare the amount of tax determined under clause (1) with 115% of the turnover tax payable or paid as found in clause (2) and adopt the higher amount as the turnover tax liability for payment for the year 2006-2007.

3. Since the amendment came into force only from 1.7.2006, petitioners and others who have been paying turnover tax at compounded rate need to pay the same for the first three months, that is upto 30th June, 2006 under clause (1) above that is, at 10% on 140 or 135% of the purchase price as the case may be. However, from 1.7.2006 onwards they have to pay higher of turnover tax by working out liability as above on a proportionate basis for three quarters of the year.

4. Senior counsel appearing for the petitioners contended that petitioners are entitled to enjoy compounding scheme of payment of tax granted by the Officer prior to amendment. Government Pleader on the other hand contended that amendment is only prospective and petitioners have no right to challenge the amendment because the scheme of payment of tax at compounded rate is only optional. I am in agreement with this contention of the Government Pleader because provision for payment of tax

at compounded rate is only an optional facility extended to bar hoteliers to settle their liability thereby avoiding controversy on the determination of sales turnover which invariably leads to dispute. In fact it is common knowledge that the entire liquor supplied to the petitioners is by Beverage Corporation which is a Government of Kerala Company. The details of sales of liquor are even made available by the company to the concerned Departmental Officers. Therefore there can be no dispute on petitioners' purchase turnover and if the petitioners want to settle liability under the compounding scheme, tax should be paid at the prescribed rate on the purchase turnover leading to absolutely no controversy. On the other hand, if the petitioners do not want to remit tax at compounded rate, they are free to maintain books of accounts pertaining to sales, remit the turnover tax on sales turnover and allow tax to be determined in assessment proceedings. Therefore there cannot be any challenge against the provision which does not apply to the petitioners unless they want to opt for it. Since the amendment is only prospective, petitioners are entitled to enjoy compounding facility accepted by them until the amendment. So far as liability after amendment is concerned, it is upto the petitioners to opt for the compounding scheme or to file returns and remit the tax in accordance with other provisions of the Act. Therefore I find no merit in the challenge

against the amendment introduced to the Act which is only optional. Though various decisions are cited and petitioners allege arbitrariness against the impugned provision, I am not inclined to consider the contention because the provisions are not applicable to petitioners unless they want the benefit of it. When petitioners can opt out of the provisions, I see no reason why they should challenge it. Petitioners have challenged the clarification issued by the Commissioner on the amendment on the ground that the option provided in clause (b) does not apply to them. I do not think there is any need to consider the challenge against clarification because the scope of Section is explained elaborately above and I find the clarification is consistent with the meaning assigned to Section by this Court. In view of this judgment, petitioners can ignore the clarification and proceed to determine tax liability in accordance with interpretation given to the Section given above by this Court.

5. Before parting with this case, I feel some clarification is required with regard to scope of clause (b) because petitioners are apprehending that the department will demand tax at compounded rate based on turnover tax liability fixed which is under contest. I make it clear that tax payable under clause (b) after amendment should not be reckoned with reference to assessed turnover tax contested in appeal or any other proceedings. In other

words, 115% of the highest turnover tax to be reckoned for the three years is the turnover tax payable based on returns filed or accounts maintained or the tax paid on assessment without any contest, and if contested the tax ultimately sustained, as and when assessment order becomes final.

6. Since W.P.s are admitted and are pending for quite some time, I feel petitioners should be given an opportunity to pay arrears of tax without interest either under the revised compounding scheme or to file regular returns and remit differential tax if any. Accordingly time is granted till 31.7.2007 to exercise fresh option and file returns and remit the tax either under the revised compounding scheme or based on sales turnover and if upto-date arrears in accordance with returns filed are paid on or before 31.7.2007, no interest under Section 23(3) or Section 23(3A) should be charged for belated payment of tax.

W.Ps. are disposed of as above.

C.N.RAMACHANDRAN NAIR
Judge

pms

C.N.RAMACHANDRAN NAIR, J.

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